No. 201.

Supreme Court of the United States.

OCTOBER TERM, 1900.

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ALFRED V. BOOTH, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

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THE PEOPLE OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Facts.

This is a criminal action wherein the plaintiff in error was indicted by the grand jury of Cook County, Illinois, the indictment substantially charging that on the 16th day of August, 1899, the plaintiff in error unlawfully did contract to have to himself an option to buy at a future time a certain commodity, to wit, grain, contrary to Section 130 of the Criminal Code of the State of Illinois, which provides as follows:

> "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall

be fined not less than $10, nor more than $1,000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void." (Record, p. 6.)

The plaintiff in error waived a jury in writing and the cause was tried by the court without the intervention of a jury.

The evidence (Record, p. 15 *et seq.*) shows that on the 16th day of August, 1899, the plaintiff in error entered into an agreement on the Board of Trade at Chicago, Illinois, with the Weare Commission Company, a corporation, whereby he was to have an option to purchase from the Weare Commission Company within ten days from that date 10,000 bushels of corn at thirty-one and one-half cents per bushel, for which option the plaintiff in error paid to the Weare Commission Company the sum of $10; that within the ten days the plaintiff in error availed himself of his right to purchase the corn in accordance with the foregoing agreement and did so purchase it. Five thousand bushels of the corn was delivered to him by the Weare Commission Company and the remaining 5,000 bushels settled through the clearing house of the Chicago Board of Trade. The plaintiff in error contended that he was guilty of no offense against the peace and dignity of the people of the State of Illinois, for the reason that the statute pursuant to which he was indicted, in so far as it attempts to invalidate a *bona fide* moral option contract wherein the parties to the contract intend in the event the option is exercised to deliver the goods and not to settle on the differences in the market value, is unconstitutional and void, as being in derogation of Section 1 of the 14th Amendment of the Constitution of the United States.

This question was raised by a motion to quash the in-

dictment (Record, p. 13), by a request to the court to hold certain propositions of law as the law of this case (Record, p. 25), by a motion for a new trial (Record, p. 27), by a motion in arrest of judgment (Record, p. 28), all of which motions and request were denied by the Criminal Court of Cook County, to which rulings of the court the plaintiff in error duly excepted.

The plaintiff in error was found guilty, as charged in the indictment, and fined $100 and costs, from which judgment a writ of error was sued out of the office of the Clerk of the Supreme Court of the State of Illinois. In that court the plaintiff in error assigned errors, raising the point that the statute, pursuant to which the plaintiff in error had been convicted, was in violation of the 14th Amendment of the Constitution of the United States. The Supreme Court of Illinois affirmed the judgment below and in its opinion passed upon the constitutionality of the act as found on pages 34 to 38, inclusive, of the Record.

The case is brought into this court by writ of error.

Errors Relied Upon.

In this court the plaintiff in error has assigned the following errors:

> "*First.* The court erred in refusing to hold that section 130 of the Criminal Code of Illinois, in so far as it provides that 'whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is in contravention of section 1, article 14, of the articles in addition to and amendment of the Constitution of the United States of America, which

provides, 'nor shall any State deprive any person of life, liberty, or property without due process of law,' and is unconstitutional and void.

"*Second.* The court erred in refusing to hold that section 130 of the Criminal Code of Illinois in so far as it provides that 'whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both,' is unconstitutional and void."

BRIEF.

Section 130 of the Criminal Code of the State of Illinois, in so far as it provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold . . . shall be fined not less than $10 nor more than $1000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts and shall be void," is in contravention of the Constitution of the United States of America which provides that "no person shall be deprived of life, liberty or property without due process of law."

The statute in full is as follows:

> "Gambling in grain, etc., § 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The word "options" at the time the law was enacted (1874) was a trade word and had the significance of a contract of purchase and sale of grain or other commodity for future delivery in which the parties did not in-

tend to deliver the thing bought or sold, but intended to settle the transaction by the payment from one to the other of the difference between the contract price and the price at the date of delivery in accordance with the rise or fall of the market.

Shaw v. *Clark et al.*, 49 Mich., 384; opinion by Justice Cooley.

Am. & Eng. Encyc. of Law, vol. 8, 1011.

Wolcott v. *Heath*, 78 Ill., 433.

Tenney v. *Foote*, 95 Ill., 99.

Pearce v. *Foote*, 113 Ill., 228.

Cothran v. *Ellis*, 125 Ill., 496.

The Supreme Court of Illinois practically overruled this interpretation of the act in the case of *Schneider* v. *Turner*, 130 Ill., 28, and held that the legislature did not intend by the act to make the most prevailing form of gambling in commodities a crime, but only intended that the law should prohibit option contracts, strictly speaking, whether the same were moral or immoral.

Schneider v. *Turner*, 130 Ill., 28.

Schlee v. *Guckenheimer*, 179 Ill., 593.

This decision has since been followed.

In *Corcoran* v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390, a contract to purchase 12,000 tons of coal at prices named with the option to purchase additional quantities at an advance of fifty cents per ton during the season was held to be void as to the option part of the contract.

In *Kerting* v. *Hilton*, 51 Ill. App. Ct. Rep., 437, an agreement providing for the employment of a party in the manufacturing business and giving him an option to buy the plant on or before a day named was held to be void under the statute as to the option clause of the contract.

Ubben v. *Binnian*, 78 Ill. App. Ct. Rep., 330.

McKeon Receiver et al. v. *Wolf*, 77 Ill. App. Ct. Rep., 325.
Wolsey et al. v. *Neeley*, 62 Ill. App. Ct. Rep., 141.
Peterson v. *Currier*, 62 Ill. App. Ct. Rep., 163.
Schlee v. *Guckenheimer*, 179 Ill., 593.

In these cases there was no element of immorality. They are cited for the purpose of defining the meaning of the act.

The statute upon the constitutionality of which the court is to pass is not one which makes it criminal to buy or sell commodities without any intention of delivering or receiving the commodity, and with the intention of settling in differences, but is on the other hand a statute which makes it criminal to enter into an option contract, whether the same is moral or immoral.

Bona fide speculation is not gambling.

Kirkpatrick v. *Bonsall*, 72 Pa. St., 115, 159.

The Chicago Board of Trade is most important to the producing community to carry the surplus production from the time of harvest until consumed. Option contracts are important for this purpose.

Option contracts are not immoral nor were they illegal at common law.

Schneider v. *Turner*, 130 Ill., 28.
Schlee v. *Guckenheimer*, 179 Ill., 593.

Courts of equity compel the specific performance of option contracts.

Watts v. *Kellar*, 12 U. S. App., 274.

By the insertion of a few words the statute would have been made beneficial to the whole community. How easy it would have been to have said "Whoever contracts to have or give to himself or another the option to sell or buy at a

future time any grain or other commodity, stock of any railroad or other company, or gold" *with the intention of not delivering the property and settling in differences, etc.*

Section 6934a of Bates Annotated Statutes of Ohio, 2nd edition, is identical with the Illinois law except for a provision confining the operation of the statute to actual gambling transactions The Supreme Court of Ohio, in the case of *Lester* v. *Buell,* 49 Ohio St., 240, decided that the statute applied to contracts for the purchase and sale of commodities in which the parties did not intend to deliver or receive the commodity, but to settle on differences, giving to the word option the significance that has often been attached to it of a gambling transaction. The other states that have legislated on the subject have made the same distinction.

Vermont Statutes, 1894, Secs. 5128-30.
Rev. Statutes of Missouri, 1889, Sec. 3831-2.
Constitution of Louisiana, 1898, Art. 189.
Compiled Laws of Michigan, 1887, Sec. 11373-5.
Code of Iowa, 1897, Sec. 4967-8.
Sanborn & Berriman's Ann. Statutes of Wisconsin, 1890, Sec. 2319a.
Code of Tennessee, 1896, Secs. 3166-7-8.
Ann. Code of Mississippi, 1892, Sec. 2117.

This is a natural distinction. There is no difficulty in defining or proving what is and what is not a contract to gamble in grain or other commodities. The intention not to deliver or receive the commodity bought or sold and to settle in differences are the elements that make contracts to buy and sell grain immoral.

The act in so far as it prohibits the making of bona fide moral option contracts deprives the citizen of liberty and property without due process of law. The liberty to con-

tract is protected by the 14th Amendment of the Constitution of the United States.

Holden v. *Hardy*, 169 U. S., 366.
Allgeyer v. *Louisiana*, 165 U. S., 578, 589.
State v. *Goodwill*, 33 W. Va., 179
Braceville Coal Co. v. *People*, 147 Ill., 66.
Munn v. *Illinois*, 94 U. S., 113.
Commissioners v. *Perry*, 155 Mass., 117.
In re Rice, 79 F. R., 627.
State v. *Five Creek Coal & Coke Co.*, 33 W. Va., 188.

The Supreme Court of Arkansas in the case of *Fortenbury* v. *State*, 47 Ark., 188, held by implication that if a statute prohibiting dealing in "futures" must be construed to apply to all contracts for future delivery which a broad interpretation of the statute might justify, then it would be unconstitutional. See, also, *State* v. *Gretzner*, 134 Mo., 512.

The act cannot be justified under the doctrine of police power.

Toledo, etc., Railway Company v. *Jacksonville*, 67 Ill., 37.
Welkinsin v. *Leland*, 2 Peters, 627.
Village of Desplaines v. *Poyer*, 123 Ill., 348.
Mugler v. *Kansas*, 123 U. S., 623, 661.
State v. *Noyes*, 46 Me., 189.

Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting.

Hartford Insurance Co. v. *Chicago, Milwaukee & St. Paul Railway Co.*, 175 U. S., 91, 106.
Printing Co. v. *Sampson*, L. R. 19 Eq., 162, 465.

There is a sharp dividing line between gambling con-

tracts and moral, legal option agreements. There is no overlapping. It is a question of intention. If the parties intend that the commodity bought or sold shall be delivered or received and paid for there is no gambling. If they intend not to deliver or receive the property bought or sold, but to settle on differences, there is gambling. To prohibit the latter it is unreasonable and unnecessary to prohibit the former. The reasonableness or unreasonableness of a state enactment is always to be considered in determining whether the legislation comes within the police power, and it is submitted that the statute as construed comes within the principles announced in *Stone et al.* v. *Farmers Loan & Trust Co.*, 116 U. S., 307, 331; *Mugler* v. *Kansas*, 123 U. S., 623, 661, 663, 664; *Chicago, etc., Railroad Co.* v. *Minnesota*, 134 U. S., 412; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Chicago, etc., Railroad Co.* v. *Wellman*, 143 U. S., 339; *Lawton* v. *Steele*, 152 U. S., 133, 136; *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362; *Covington & Temple Co.* v. *Sandford*, 164 U. S., 578; *Holden* v. *Hardy*, 169 U. S., 366, 392; *Smyth* v. *Ames*, 169 U. S., 466; *Lake Shore & Michigan Southern Railway Co.* v. *Ohio*, 173 U. S., 285, 301; *Lake Shore, etc., Railway Co.* v. *Smith*, 173 U. S., 684.

ARGUMENT.

This statute is aimed at the suppression of gambling in grain or other commodities.

We admit that the state has the right under its police power to prohibit gambling in any form and to make the offense of gambling a crime.

We deny that the state has the power to forbid any person of competent understanding to enter into a legal, moral option contract.

The Supreme Court of Illinois has decided that the statute should be construed so as to forbid not only immoral "option" contracts, but also all *bona fide* moral option agreements.

This court is bound by the construction of the Supreme Court of Illinois as to the meaning of the act (*Erie R. R. Co.* v. *Pennsylvania,* 158 U. S., 431; *Forsythe* v. *Hammond,* 166 U. S., 506, 519, and cases cited), although not as to its constitutionality. In order, therefore, to define more clearly its meaning, attention will be called to the divers meanings of the word "option," when applied to operations upon the Board of Trade and Stock Exchanges, and to the judicial history of the act in question.

The Am. Enc. of Law, Vol. 8, 1011, says:

> "Some of the courts have used the word 'option' very laxly. In many instances it has been applied to any contract which the parties intended to settle by way of differences. This extended use of the word has lead to what may seem to be a conflict in decisions,—thus it has been laid down that optional contracts are void as against public policy, and the unwary might infer that this applied to options strictly so called. An examination of the cases, however, reveals the fact that the language is applied to contracts under which the intention of the parties was

to speculate in differences and which therefore were invalid no matter what their form was."

The encyclopedia cites many cases under the above quotation, but none of them are cases of pure option contracts and an examination of the citations shows that the author of the article fell into the unfortunate situation against which he had warned the unwary.

Shaw v. *Clark et al.*, 49 Mich., 384, was a suit on a note of $4,000 in the hands of an innocent purchaser for value. The defense was that the consideration of the note was illegal and void as arising from certain gambling dealings in "options." Judgment for the plaintiff.

Justice Cooley, in delivering the opinion of the court, said:

> "In common speech gaming is applied to play with stakes at cards, dice, or other contrivance to see which shall be the winner and which the losers. A contract for the purchase of options is not gaming within this meaning of the term. *In form it is the purchase and sale of the commodity to be delivered at a future day and it only resembles gaming in that the parties take a chance of gain or loss without intending that the sale which they nominally make shall ever become a legitimate business transaction.*"

The statute in question was enacted in 1874, and in September, 1875, the Supreme Court of the State of Illinois decided the case of *Wolcott* v. *Heath*, 78 Ill., 433. In that case a commission firm of Chicago brought suit against the defendant to recover from him certain sums of money due it for commissions and advancements made by it for the defendant in transactions upon the Board of Trade in Chicago, which transactions were *bona fide* purchases and sales of grain, and not in a strict legal sense option contracts, or in other words "puts" and "calls." The court gave judgment for the plaintiff, and said:

"Our present statute was not in force when these

> dealings were had consequently the rights of the parties are not affected by it. What the law prohibits and what is deemed detrimental to the public interests is speculations in differences in market values."

This quotation was *obiter*, but shows that the court in 1875 understood that the evil to be remedied was the practice of selling and buying grain or other commodities with the intention of settling in differences.

Again in the case of *Tenney* v. *Foote*, 95 Ill., 99, we have a similar state of facts. The plaintiff, the assignee of Hooker & Co., a firm of commission merchants, brought an action on a promissory note to recover the sum of $5,000 payable to the order of the defendant, who had endorsed it to the assignor, Hooker & Co. The defense to the action was that the note had been given by the defendant to the plaintiff's assignor in settlement of certain gambling transactions carried on by Hooker & Co. in behalf of Foote. The evidence in the case shows that Foote made a contract with Hooker & Co., brokers, to purchase and sell for him upon the Chicago Board of Trade grain and other produce, it being agreed between the parties that no grain or other produce should ever be delivered to Foote, but that it should be bought and sold for future delivery and settlement be made between the brokers and Foote upon the difference in the market prices, it being understood that in the event a profit resulted from the transactions that Hooker & Co. were to pay the profit, less their commissions to Foote, and in the event there was a loss Foote was to pay the loss to Hooker & Co. The evidence shows that the transactions carried on by the parties upon the Chicago Board of Trade were the actual purchase and sale of the commodities and not, strictly speaking, option contracts. The opinion of the Appellate Court, which was affirmed by the Supreme Court of Illinois, after quoting

Section 130 of the Criminal Code, contains the following:

"The question whether or not the original contract between Foote and Hooker & Co. falls within this statute, is the turning one in the whole case, so far as the defense is concerned. There has been much difference of opinion as regards the nature of the contract prohibited. It must be, to fall within the prohibition, a contract to have to one's self, or give to another, an option to sell or buy some commodity at a future time. The word 'option' is one much in use on the Chicago Board of Trade, and probably has more than one sense given it there. Boards of Trade, for dealing in the principal products of the country, are of comparative recent origin. The system seems to have been borrowed from, and, in its general features, modeled after, the more ancient institution known as the stock exchange, in which many phrases, words and terms of peculiar local meaning came into use; and it will be found that many of these have been carried into and adopted in boards of trade. Now the word option was in use long ago in the stock exchange, and seems to have acquired a definite meaning. As there used, it meant 'A stipulated privilege to a party in a time contract, of demanding its fulfillment on any day within the specified limit.' Webs. Dict., Ed. 1872, p. 917.

"In practice on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right or privilege of selling or buying; and it is the contracting for such choice, right or privilege of buying or selling at a future time any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified. The statute was passed

from motives of public good, and to repress an evil. Hence, it follows from established rules of law, and their analogies in such cases, that no matter what form the transaction bears as to the terms of the contract, still, if such form be colorable only, and the real intention of the parties be that there is to be no sale of the article—no delivery or acceptance of it—but the transaction to be adjusted only upon differences, it is a gambling transaction within the statute.

"*In Grizewood* v. *Blain*, 11 C. B., 73, E. C. L. Reports 538, suit was brought upon a contract for the sale of shares of stock. The defense was that it was a gambling transaction under a British statute likeours. There was a contract in form, but the chief justice left it to the jury to say what was the plaintiff's intention at the time of making the contract—whether either party really meant to purchase or sell the shares in question, telling them that if they did not, the contract was, in his opinion, a gambling transaction, and void. The jury found for the defendants. Of course there were circumstances in evidence tending to show their intention. On motion for new trial before the full bench, the direction of the chief justice to the jury was held to be right, the court holding that the intention of the parties that there should be no delivery of the stock, that they should settle upon differences, rendered it a gambling transaction and void. *Steers* v. *Gashley*, 6 Durnf. and East., 61; *Brown* v. *Turner*, 7 Id., 630."

The court held that the transactions of the parties which were not strictly speaking option contracts came within the statute and decided in favor of the defendant.

This citation shows: first, that at the time of the decision, namely, October, 1879, the term "option" had a general significance of a transaction in which the parties intended to settle in differences; and second, the confusion in the meaning of the term "option" at the time the law was enacted, namely, 1874, as well as at the time the decision was rendered in 1879. It further shows that the evil which it was

sought by the law to prevent were transactions in which the parties to them intended to settle in differences.

The case of *Grizewood* v. *Blain*, 11 C. B., 73, cited in the opinion, was not a case in which the parties either bought or sold a put or a call, but it was a case in which there was an actual sale or purchase of railway shares where neither party intended to deliver or accept the shares but merely to pay the differences according to the rise or fall of the market.

The case of *Pearce* v. *Foote*, 113 Ill., 228, arose out of exactly the same state of facts as the case of *Tenney v. Foote* heretofore cited. The contracts were the purchase and sale of the commodity with the intention of settling on differences and not option contracts. In the case of *Pearce* v. *Foote* the court held that the contracts entered into by the parties came within the provisions of Section 130 of the Criminal Code of Illinois, and said:

> " . . . *It needs no illustration to make it apparent the contract between plaintiff and Hooker & Co., as the trial court must have found it from the evidence, comes exactly within the meaning of section 130 of the Criminal Code, that declares:* 'Whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain or other commodity shall be subject to a fine or imprisonment, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.' It is seen this statute forbids anyone to contract to have or to give to himself or to contract to give to another *the privilege to deal in options.* That is precisely what Hooker & Co. did. They contracted to give to plaintiff the privilege to deal in options and settle with them upon differences as indicated or determined by the fluctuations of the market. That is one of the offenses against which the statute is levelled. . . . *The agreement, as the trial court was authorized to find it is, that Hooker & Co. contracted to give plaintiff the privilege to deal in options with or*

through them, and if there was a loss plaintiff was to pay it to them, and if there was a gain Hooker & Co. were to pay it to them, and for their services they were to be paid a commission. . . . Although the statutes being considered are highly penal there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished—*to prohibit all dealings in options in grains or other commodities.* . . . Considerable fortunes secured by a life of honest industry have been lost in a single venture in *options.* The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the Board of Trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law and receive its sanction and all the support that can be given to them. *It is only against unlawful 'gambling contracts' the penalties of the law are denounced,* and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished."

The court in this decision, measured by its later decisions, manifestly made a mistake, although in our opinion the court was right. The court under its later decisions erred in holding that the contract entered into came within the provisions of section 130 of the Criminal Code, although the contract in itself was unlawful and void under the common law for the reason that it was a gambling contract, and reference to the case shows that the transactions of the parties were the actual purchases and sales of the commodities with the intention of settling upon the differences in the market value of the commodities bought and sold. This case, however, shows into what confusion the court had fallen as to the meaning of the word "option," and that at the time the decision was made, namely, 1885, and prior to that time, the term "op-

tion" was used to signify any contract of purchase or sale upon the Board of Trade wherein the parties did not intend to deliver the commodity, but intended to settle in differences.

The case of *Cothran* v. *Ellis et al.*, 125 Ill., 496, was a case in which the plaintiffs brought suit against the defendant to recover upon a note which the defendant had given to them in settlement of certain transactions which he had employed them to carry on for him upon the Chicago Board of Trade. The transactions were the actual purchase and sale of grain and produce, and the courts below found as a matter of fact that there was no gambling in the transactions; the court above held that there was, in its opinion, no intention to deliver the commodities, but only to settle in differences, though it did not disturb the judgment, because not at liberty to re-examine the facts. It took occasion to hold that at this time, namely, 1888, the word "options" had a peculiar significance and a different one from its technical meaning when applied to a pure option contract. We quote the following *obiter* from the opinion of the court:

> "But leaving both sections of the statute cited entirely out of view, we are clearly of opinion that dealing in 'futures' or 'options,' as they are commonly called, to be settled according to the fluctuations of the market, is void, by the common law, for, among other reasons, *it is contrary to public policy.* It is not only contrary to public policy, but it is a crime—a crime against the State, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and pre-eminently the national sin. In its proportions and extent it is immeasurable. In its pernicious and ruinous consequences it is simply appalling. Clothed with respectability, and entrenched

behind wealth and power, it submits to no restraint, and defies alike the laws of God and man. With despotic power it levies tribute upon all trades and professions. Its votaries and patrons are recruited from every class of society. Through its instrumentality the laws of supply and demand have been reversed, and the market is ruled by the amount of money its manipulators can bring to bear upon it. These considerations imperatively demand at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse."

The Supreme Court of Illinois in the case of *Schneider* v. *Turner*, 130 Ill., 28, gave a new interpretation to the act from that which it had theretofore held was the proper significance to be attached to the law. In that case the plaintiff sought to recover upon the following option contract:

"CHICAGO, November the 11th, 1885.

"In consideration of one dollar, and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Snyder, William L. Peck, Ferd. W. Peck, 1786 shares of the capital stock of the North Chicago City Railway at $600 per share if taken on or before the 15th day of December, 1885.

"V. C. TURNER."

Although the above contract was held by the court not to be tainted with any element of immorality it held that it came within the statute. The court said:

"Prior to this act is was lawful to contract to have or give an option to sell or buy, at a future time, grain or other commodity. Such contracts were neither void nor voidable at the common law. There was and is nothing illegal or immoral in an option contract in itself."

The court in so construing the law reasoned that it must

have been the intention of the legislature to declare that unlawful which theretofore had been lawful, and as all contracts for the purchase or sale of commodities in which the parties intended to settle in differences were void at common law it must follow that the legislature did not intend to declare unlawful contracts which were already unlawful. It boots nothing to question the reasoning of the court here, but suffice it to say that gambling in grain, although unlawful, being against public policy, had not prior to the enactment of this statute been declared to be an offence against the peace and dignity of the people, and the reason that animated the legislature was probably the taxing of a heavy punishment against persons who bought or sold grain or other commodities with the intention of settling in differences. There is no other form of gambling which by the laws of the State of Illinois is made a penal offense subject to a fine not exceeding $1,000 and imprisonment for one year, and it is therefore probable that the legislature intended to prohibit gambling in grain by making it highly penal for any person to engage in such gambling. The most common form of gambling in grain and other commodities is the actual purchase and sale of the commodity with no intention of delivering the commodity and with the intention of settling in differences. While there are hundreds of cases in the reports in which the courts have found that the parties to the contracts upon which the cases arose engaged in the actual purchase and sale of commodities with the intention of settling in differences contrary to the statutes of many of the states, there is only one case in all the books where the court found that either of the parties intended to gamble through the instrumentality of a put or a call which must be transformed into an actual contract of purchase and sale before the parties can settle in differ-

ences, and that is the case of *ex parte* Young, 6 Bissell, 53, in which Peyton R. Chandler and Chandler, Pomeroy & Co. are shown to have endeavored to corner the oats market of the Chicago Board of Trade and in so doing had entered into "put" contracts giving to some 125 persons the option to sell to Chandler and Chandler, Pomeroy & Co. oats at the price of forty-one and one-half cents per bushel on or before the 30th day of June, 1872. On the 18th of June the firm of Chandler & Company failed and oats went down to twenty-six cents and the parties holding the options tendered the grain to Chandler which Chandler refused to receive, whereupon action was brought to recover the difference in the price offered in the option and the actual market price upon the day of delivery. Judge Blodgett held that the parties who bought the options to sell the oats intended to gamble and that it was a fight between them and Chandler, Pomeroy & Co., wherein the parties who purchased the options were betting that Chandler, Pomeroy & Co. could not corner the market and therefore denied their action except to the extent that they might recover from Chandler, Pomeroy & Co. the amounts which they had paid for their options. It therefore appears that the case of *Schneider* v. *Turner* judicially legislated out of Section 130 of the Criminal Code of Illinois gambling contracts wherein the parties actually purchase and sell the commodity with the intention of settling upon differences, which transactions are often called options, and substituted in place thereof legal and moral option agreements. *Schneider* v. *Turner* was affirmed in the case of *Schlee* v. *Guckenheimer*, 179 Ill., 593, where the court said:

> "By the common law contracts of this character are valid as under the common law the contract to have or give an option to sell or buy at a future time grain or other commodity was neither voidable nor void."

The practical operation of Section 130, as construed by the Supreme Court of the State of Illinois and by which construction we must here determine its constitutionality, is seen from the following cases:

Corcoran v. *Lehigh & Franklin Coal Co.*, 138 Ill., 390.

In that case a coal company sent a written offer to a coal dealer to sell and deliver 12,000 tons of coal at the dock of the latter at prices named, in which offer, after reciting the terms of payment, it was stated:

> "Should you require any coal on our dock, we will name you fifty cents per ton in advance of above prices during the season, provided you purchase the above order from us,"

which offer was accepted. The court held that the offer and acceptance constituted a complete contract for the sale and purchase of 12,000 tons of coal independent of the option clause, but that, in so far as an option was attempted to be given or secured, the contract was void under Section 130 of the Criminal Code, although the contract was such an one as any prudent merchant would enter into who expected to have large sales and desired to know the price at which he would be able to obtain the coal before entering into any agreements to sell it. The contract the court held was in every sense moral, but inasmuch as it came within Section 130 as such section had been construed in the case of *Schneider* v. *Turner*, it could not be enforced.

In the case of *Kerting* v. *Hilton*, 51 Ill., App. Ct. Rep., 437, an agreement providing for the employment of a party in the manufacturing business and giving him the privilege of buying the plant on or before a day mentioned, but containing no promise or undertaking on his part to buy it, was held to be a mere option contract and void un-

der the statute, although it contained no element of immorality. See, also,

Ubben v. *Binnian*, 78 Ill. App. Ct. Rep., 330.

McKeon, Receiver, et al. v. *Wolfe*, 77 Ill. App. Ct. Rep., 325.

Wolsey et al. v. *Neeley*, 62 Ill. App. Ct. Rep., 141.

Peterson v. *Currier*, 62 Ill. App. Ct. Rep., 163.

Schlee v. *Guckenheimer*, 179 Ill., 593.

In all of these cases there was not an element of immorality or intimation that the parties intended to settle their agreements upon differences, yet the court held that they came within the inhibition of Section 130 of the Criminal Code.

These cases have been cited for the purpose of showing the state of the law in Illinois, and the extent to which the right of the citizen to make moral contract has been invaded through erroneous judicial construction.

It is a matter of common knowledge that the most common and ordinary form of gambling in grain or stocks is the actual purchase and sale of grain or stocks with the intention at the time of settling in differences. There are hundreds of civil cases in which it has been found by the court that the parties did sell and purchase commodities for future delivery with the intention of settling in differences, yet because that is true the legislature would not have the right to prohibit all sales for future delivery. The right of the legislature to prohibit the making of all contracts in which the parties intend to settle in differences, because such contracts are immoral, and to make it a highly penal offense for a person to engage in such gambling, is conceded; the power to prohibit the sale of all commodities for future delivery, whether the parties intend to settle in differences or not, is denied, and to sustain such power would

be to practically annihilate commerce. The farmer sells his grain and cattle for future delivery before the crops are harvested or the cattle fattened. The manufacturer sells his output for future delivery before he has manufactured the goods; the wholesale merchant sells his merchandise for future delivery months before the goods have been delivered to him, and so on through all the fields of commerce, sales for future delivery are indispensable.

No one will contend that the legislature has such right to prohibit the purchase and sale of commodities for future delivery where the parties intend to deliver the goods and do not intend to settle in differences. How much less power would the legislature have to prohibit a legal moral option contract, which is far less a medium for gambling in grain or other commodities and a much more cumbersome contract for such gambling. But this court is bound by the construction which the Supreme Court of the State of Illinois has given to the act in question, namely, that it applies to every strictly speaking option contract, whether the same is moral or immoral. We contend that the act so construed is an unreasonable exercise of the police power and in violation of the constitution.

We do not contend, however, that an act of the legislature would be unconstitutional making unlawful either a contract of purchase and sale or an option contract in which the parties intended to settle on differences. We insist that the defendant is not guilty of any offense against the peace and dignity of the People of the State of Illinois, for the reason that he did not gamble. The evidence is this cause shows him to have been guilty of an act made criminal by Section 130 of the Illinois Criminal Code, as construed by the courts of that state, which act is wholly innocent and moral in itself.

The legislature intended to prohibit gambling, but it

not only did not, as the law has been construed in the Supreme Court of Illinois, prohibit gambling in grain and other commodities in its most common form, but did prohibit the making of a contract which in only one case in all the law books has been found to have been used for the purpose of gambling, and at the same time a contract very important to that class of persons who carry the surplus production of the farmer during the time between its harvest and consumption and thereby maintain a constant market for the products of the producing community. These men are called speculators, and there is a wide difference between speculating and gambling.

In *Kirkpatrick* v. *Bonsall,* 72 Pa. St., 155, 159, the court said:

> "We must not confound gambling, whether it be in corporation stock or merchandise, with what is commonly termed speculation. Some speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think on and weigh, that is, speculate, upon the probabilities of the future in their business transactions, and in this way often exhibit high mental grasp and great knowledge of business, and of affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and buy or sell in a *bona fide* way. Such speculation cannot be denounced."

The statute was aimed at the Board of Trade and Stock Exchange, but instead of discriminating between that which is good and that which is bad, between that which is moral and that which is immoral, as all other States of the Union which have enacted laws relating to the subject-matter have done, the legislature (assuming that the Supreme Court was correct in its construction of the law in *Schneider* v. *Turner*) included all contracts to have or give an option, and thereby made the statute void, at least

in so far as it declared that moral option agreements are illegal.

In the machinery of modern industrialism speculation is a necessity, and especially is this true in the distribution of the most important products of the farmer. During the first half of each year the farmer sells the products of his lands much more rapidly than those products are consumed. The man who buys that product and holds it until there is a demand for its consumption is a speculator. He may or may not own a warehouse or a mill; if he buys, not in view of the immediate demands of his trade, but in view of the deferred and prospective requirements of the consumer, he is a speculator. The states composing the Northwest Territory produce largely in excess of the home use, and at times greatly in excess of the world's demand for immediate consumption. At this time there is in the United States accumulated in warehouses and in transit fifty million bushels of wheat alone. Practically all the wheat is owned to-day by speculators, and by far the largest percentage of it is carried by purchases made on the Board of Trade in the City of Chicago. There is approximately five million bushels in the interior warehouses of Minnesota and the Dakotas, and a large percentage of this wheat is sold in Chicago for future delivery. Minneapolis and Duluth are the natural outlets for this wheat, but they have not the volume of speculative trade necessary to take these large offerings and carry them. Consequently the warehouseman, as he buys wheat from the farmer, sells it in Chicago for future delivery when he thinks the market is most advantageous. Thereby he avoids the risk of the market.

The millers in Minneapolis operate in the same way. Each milling company has its brand of flour which requires a special mixture of wheat to make. To insure to

themselves the possession of the desired quantities or grades they buy far in excess of their immediate requirements, and to protect themselves from loss in case of a declining market they sell wheat in Chicago for future delivery, and buy it back as they grind the wheat in their possession and find a market for their flour. If they are producing flour in excess of the current demand, instead of shutting down the mill or reducing the rate of output, they sell wheat against it in Chicago. In Minneapolis to-day there are more than six million bushels of wheat mainly carried in this manner through speculation in Chicago. In Duluth there are more than three million bushels carried in the same manner. There are about thirty-five million bushels en route to European markets from all parts of the world. A merchant in Europe buys a cargo of wheat in California or Australia. It will be months before that wheat becomes available for sale and distribution by him. He sells against it in Chicago for future delivery and reduces the risk of price in the interim. When his cargo arrives, as he disposes of it, wholesale or retail, he buys in his sales previously made in Chicago.

It is, therefore, manifest that the Chicago Board of Trade is the great center of this speculative operation so beneficial and necessary to the moving of the surplus farm products of the world. What is true of wheat is true of corn, hog products and other commodities. Buyers and sellers of farm products all over the world buy and sell through the Board of Trade in Chicago, not because it is the highest market necessarily, or the lowest, but because they can purchase or sell any amount, great or small, with greater facility, less expense and risk, than at any other market. To provide a market for and to distribute the enormous surplus of grain and commodities requires facil-

ities and commercial machinery of the highest order. The simple transaction by which a speculator buys a few wagon loads of wheat of his neighbor and puts them in his own granary to await a period of less plenty and higher prices will not furnish a market for a hundred million bushels. A large central market, great numbers of contributors, immense sums of money, insurance companies, warehouses, railways, steamships, telegraph companies, banks and clearing-houses are needed. The machinery of speculation is highly complex. The freedom to buy and sell must be unrestricted and the facilities for buying and selling and for the fulfillment of contracts must be of the highest order. Here is where the prejudice that finds lodgment in the public mind and its echo in the courts has its origin. They very complexity of the machinery by which the trade is carried on bewilders the uninitiated. For a long time the courts looked askance at the devices for settling trades by mutual cancellation through the clearing-house, thus avoiding the risk and labor of an actual physical delivery of the warehouse receipts. The legitimacy of these transactions is now well established in law. Another and fruitful source of prejudice is that speculative purchases and sales are seldom for immediate delivery. Here, as everywhere else in trade, the wholesale price is less than the retail price. The man who makes a business of it buys large sums of cash grain and sells it for delivery six months ahead. He gets favorable terms on storage, lower rates for money, and cheap, long-term insurance. He can sell that grain to a speculator for future delivery at a price less than it would cost the speculator to buy the cash grain and carry it himself. There are in Chicago at this time upwards of twenty-five million bushels of wheat carried in this way by purchase for future delivery. The buyer at the country station, the shipper,

miller and exporter, the importer, all make the bulk of their sales for delivery at some future time. It follows that along with the custom of making contracts for purchase and sale of products for delivery at some future time has grown the necessity of making unilateral contracts to buy or sell within a definitely prescribed time. These contracts are called "puts" or "calls," and are of vast importance in handling the surplus products of our country. The exportation of grain and its shipment to other places and other states are almost wholly accomplished through the use of what are termed "firm offers." The firm offer is an offer to sell a certain commodity left open by agreement for a certain length of time pending acceptance by the buyer. Almost the entire receipts of grain in Chicago are brought there by the same process. It is brought on offerings to buy, left open by agreement to be accepted or not accepted at some future time. These offers are termed "firm bids."

The transaction for which the plaintiff in error was convicted is termed a call, and this is precisely the same form of transaction as the firm offer, except in a call a consideration is paid the seller for leaving the offer open for a certain length of time. One is a contract, the other is not.

Clark on Contracts, page 50 and citations.

A put is precisely the same thing as a firm bid, except that in a put a consideration is paid the buyer for leaving his offer open. It is the custom on the Chicago Board of Trade for the large firms engaged in the exportation of grain to cable a firm offer to Liverpool or other foreign port offering to sell grain to be delivered in thirty or sixty days at about the market price in Chicago plus the cost of delivery. These offers are made upon the basis of what is known as the London Corn Exchange contract, which is entered into before business is opened up with foreign

dealers. This contract provides that all firm offers which are cabled from Chicago at the close of business shall be open for acceptance until 3 o'clock at Liverpool the following business day, which is 9 o'clock A. M. in Chicago. This contract gives the foreign buyer the whole of the following business day within which to determine whether or not he will accept the offer cabled from Chicago. In cases of unusual disturbances such as we frequently have in foreign countries, or contingencies that are likely to happen on this side, it is a very risky proposition to offer several hundred thousand bushels of grain without any possible insurance as to what the price will be.

Exporters have been accustomed to go into the market and buy what they term their "insurance," namely, a call for the quantity of grain which they offer to export. In addition to paying the seller of the call a sum for the privilege of calling this grain within a certain period, they often pay a premium over the closing price. Then if the acceptances have been considerable and the action of the market is such that it is a saving to take advantage of their option they take advantage of it. If the market has not moved, or if it is lower, so that the grain may be purchased for a less sum, they do not avail themselves of their option and a sale is never made. If an offer to sell wheat has been based upon the market price being ninety cents when the offer is made, and before acceptance wheat should go up to ninety-five cents, a great loss would fall on the exporter; and, therefore, to insure himself against such loss, the seller pays something for the privilege of purchasing wheat at ninety cents, or at ninety and one-fourth cents; or in other words, enters into a contract whereby some one agrees to sell to him grain at a certain fixed price within a definite time. He is thereby sure that should his offer be accepted

he can procure the grain at a price at which he can afford to deliver it.

Mr. Homer H. Peters, a witness who testified in behalf of the defendant, and whose testimony is found beginning on page 18 of the Record, a member of Bartlett Frazer & Co., of Chicago, one of the largest exporters of grain in the United States, testified that the foregoing is a true statement of the manner of doing business upon the Board of Trade in Chicago; the court below ruled out his testimony on the ground that the court took judicial notice that such was the fact inasmuch as it was a matter of common knowledge.

Such option contracts are never settled on differences. It is a matter of common knowledge that all stock and produce exchanges forbid any transaction wherein the parties do not intend to deliver the commodity and intend to settle in differences; and that such exchanges severely punish the members for any violation of the rule. The only place where such transactions can be carried on is in the bucket-shops, and a statute prohibiting the colorable purchase or sale of the commodity wherein the parties did not intend to deliver the commodity, but to settle in differences, if enforced, would cure the defect without prohibiting moral contracts.

As stated heretofore, such transactions as are carried upon the Board of Trade are never settled on differences. The testimony of Mr. William S. Crosby, a witness on behalf of the defendant, which is found beginning on page 22 of the Record, fully sustains this statement; his testimony was ruled out by the court upon the ground that the statements of the witness were matters of common knowledge, and the court would take judicial notice of their truth.

It has been a common practice for buyers of grain throughout the country, as they buy from the farmers from

day to day, the amount which they pay being governed by the Chicago market price, and it taking them a day or two to get the grain which they buy into Chicago, to protect themselves on the Chicago market against the fluctuation of grain by buying puts; in other words, by entering into an agreement with some person in Chicago upon the Board of Trade whereby that person offers to buy grain, and for a consideration paid to him agrees to leave the offer open for a certain time. Such purchases and sales are never settled by differences, and are never intended to be so settled. They are essential and necessary to the distribution of the products of the farmer and should not be prohibited.

It is necessary that these offers to buy and sell be made in good faith, and that the party who has offered to sell for exportation or future delivery large quantities of grain as against his option purchases should have some assurance that these offers to sell to him will remain open for a specific time. It is, therefore, best that these offers should be merged into contracts to have the option by the payment of a consideration. Section 130 of the Criminal Code declares such contracts to be illegal when supported by a consideration. It hardly need be suggested that the agreement to leave the offer open, when supported by a consideration, is the more legitimate of the two. In the one there is a a moral obligation; in the other both legal and moral.

Option contracts are not immoral, nor were they illegal at common law.

In *Schneider* v. *Turner*, 130 Ill., 28, the court went so far as to say that—

> "Such contracts are neither void nor voidable at the common law. There was or is nothing illegal or immoral in an option contract in itself."

The court affirmed this position in *Schlee* v. *Guggenheimer*, 179 Ill., 593, and it is now well settled that a court

of equity may decree the specific performance of option contracts.

The statute in question was enacted to prohibit and punish gambling. It is entitled "Gambling in Grain," etc. Yet the State is seeking by this prosecution to punish the plaintiff in error for a *bona fide* moral commercial transaction which contained no element of gambling. By the mere insertion of a few words in the statute it may be made one beneficial to the whole community, but the legislature, by leaving out those words, have rendered it, with its accepted construction, obnoxious to the Constitution. How easy it would have been to have said, "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or gold," *with the intention of not delivering the property and settling in differences,* etc.

Section 6934*a* of Bates' Annotated Statutes of Ohio, 2nd Edition, contains the laws of Ohio relating to this subject, which are almost in the identical langauge of the Illinois statute except for the provision which limits the effect of the law to contracts where the parties did not intend to deliver the commodity sold, but only to pay the differences. The Ohio statute in full is as follows:

> " Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock of any railroad, or other company, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to such commodities, shall be fined not less than $20, nor more than $500, or confined in the county jail not exceeding six months, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void; *provided that the provisions of this law shall only be held to mean and apply to*

such contracts where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only the payment of differences by the parties losing upon the rise or fall of the market."

In the case of *Lester* v. *Buell*, 49 Ohio St., 240; 34 Am. St. Rep., 556, the Supreme Court of Ohio decided that the above statute applied to contracts for the actual purchase and sale of commodities in which the parties did not intend to deliver or receive the commodity, but to settle in differences, giving to the word "option" the significance that has often been attached to it of a gambling transaction.

Many of the states of the Union have enacted laws making it an offense to gamble in grain or other commodities, but in no case except that of Illinois have the legislatures failed to expressly confine the operation of the law to those cases of the purchase and sale of commodities where the parties did not intend to deliver the goods, but intended to settle on differences.

Vermont Statutes, 1894, Sec. 5128-30.

Rev. Statutes of Missouri, 1889, Sec. 3831-2.

Constitution of Louisiana, 1898, Art. 189.

Compiled Laws of Michigan, 1887, Sec. 11373-5.

Code of Iowa, 1897, Sec. 4967-8.

Sanborn & Berriman's Ann. Statutes of Wisconsin, 1890, Sec. 2319*a*.

Code of Tennessee, 1896, Sec. 3166-7-8.

Ann. Code of Mississippi, 1892, Sec. 2117.

This is a natural distinction for the legislature to make. There can be no other possible definition of gambling in grain or other commodity except a contract to buy or to sell grain or other commodity for future delivery, where the parties to the contract do not intend to deliver the grain or other commodity, but intend to settle on the differences between the market values at the time of the contract and at

the date of delivery. This, or language substantially like it, fully covers every transaction for the purchase or sale of grain wherein the parties intend to gamble, and the legislature, by making an act described in such terms an offense, could cover every possible case in which the parties intended to gamble. It is, therefore, an unnecessary and unreasonable exercise of the police power of the legislature to prohibit *bona fide* moral option contracts in order to prohibit gambling, especially in view of the fact that gambling in grain and other commodities is seldom resorted to through the instrumentalities of option contracts, strictly speaking, but is carried on in its most common form in contracts for the actual purchase and sale of the commodity. In fact, under the contract under which the plaintiff in error was punished there could be no settlement in differences. He paid ten dollars for the "call" on the grain within the time specified. Suppose that within that time the market had fallen ten cents per bushel. In that case he would doubtless have purchased the corn elsewhere and lost the ten dollars paid. The Weare Commission Company would not have paid him anything. There can be no settlement in differences under such a contract or until the purchase or sale is actually contracted. Therefore, we contend that the legislature in prohibiting the making of *bona fide* moral option contracts deprived the citizen of liberty and property without due process of law.

The State of Arkansas enacted a statute providing that the "buying or otherwise dealing in what is known as futures for any cotton, grain, or anything whatsoever, with the view to profit is hereby declared to be gambling."

The Supreme Court of Arkansas, in the case of *Fortenbury* v. *State*, 47 Ark., 188, construing this statute to apply to actual gambling transactions, said:

"This phrase has acquired the significance of a

mere speculation upon chances, where the grain, cotton or stocks dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle upon the difference of the market. When so limited by judicial interpretation the statute is not inconsistent with public policy. It forbids and punishes wagering contracts; that is, contracts which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of any such gain or loss."

The court by implication held that if this statute must be construed to apply to all contracts for future delivery which a broad interpretation of the language might justify, then it would be unconstitutional.

In the case of *State* v. *Gritzner*, 134 Mo., 512, an indictment charged in several counts that the defendant sold grain with no intention of delivering and sold grain on optional delivery in contravention of Section 3131 of the Revised Statutes of Missouri, which statute declared all purchases and sales or pretended purchases and sales of commodities when the parties had no intention of receiving or paying for the property or delivering the same, or the buying or selling, or pretended buying and selling, on margins, or on optional delivery, when the party selling, or offering to sell, does not intend to have the property on hand or under his control to deliver, to be gambling, and unlawful, and providing a penalty in the event any person should be found guilty of violating the provisions of the statute. It will be observed that the statute makes the distinction between lawful contracts for optional delivery, or for the purchase and sale of commodities, and contracts in which the parties did not intend to deliver the commodity but to settle on differences. In this case the statute was attacked upon the ground that it deprived persons of liberty and

property without due process of law, and concerning the point the court said:

> "The other point that the statute is violative of that provision of the constitution which commands that no person shall be deprived of life, liberty or property without due process of law (Sec. 30, Art. 2), may be very briefly disposed of by saying, while that section secured the undoubted liberty to contract in a lawful way, yet that does not include nor grant the license to gamble."

The court held the statute constitutional because it affected only unlawful contracts.

In *Holden* v. *Hardy*, 169 U. S., 366, the court said:

> "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a State law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

In the case of *Allgeyer* v. *Louisiana*, 165 U. S., 578, 589, the court said:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

See also

State v. *Goodwill*, 33 W. Va., 179.

Braceville Coal Co. v. *People*, 147 Ill., 66.
Munn v. *Illinois*, 94 U. S., 113.
Commissioners v. *Perry*, 155 Mass., 117.
In re Grive, 79 F. R., 167.
State v. *Fire Creek Coal & Coke Co.*, 33 W. Va., 188.

In the case of *Toledo, etc., Railway Company* v. *Jacksonville*, 67 Ill., 37, the court said:

> "Under pretense of making police regulations the legislature cannot enact laws unnecessary to the preservation of the health and safety of the community, or prohibit that which is harmless in itself."

In *Wilkinson* v. *Leland*, 2 Pet., 627, Justice Story said:

> "A legislature may enjoin, forbid and punish; they may declare new crimes and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime."

In the case of *Lake Shore & Michigan Southern Railway* v. *Ohio*, 173 U. S., 285, 301, Mr. Justice Harlan said:

> "The reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority or is to be deemed a legitimate exertion of the power of the State to protect the public interests or promote the public convenience."

In the case of *Hartford Insurance Company* v. *Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S., 91, 106, the court, quoting from the opinion of Sir George Jessel, M. R., in *Printing Company* v. *Sampson*, L. R., 19 Eq., 462, 465, said:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

The principle which underlies the exercise of the police power is best stated in the idiom *sic utere tuo ut alienum non laedas*. This is the best expression of the extent of the police power; that cannot be prohibited which is not harmful.

In the case of *State* v. *Noyes*, 46 Me., 189, the court said:

> "With the legislature the maxim of law *salus populi lex* should not be disregarded. It is the great principle upon which the statutes for the security of the people are based. It is the foundation of criminal law in all governments of civilized countries and of other laws conducive to the safety and consequent happiness of the people. This power has always been exercised and its existence cannot be denied. How far the provisions of the legislature can extend is always submitted to its discretion provided its acts do not go beyond the great principle of securing the public safety and its duty to provide for the public safety within well defined limits and with discretion is imperative."

Tiedemann on Constitutional Limitations of Police Power, Sec. 1.

Can there by any doubt that the legislature went beyond well-defined limits in the act denying to persons

the right to enter into option contracts? If it were difficult to distinguish between what contracts are moral and what contracts are immoral, then there might be some ground for the action of the legislature. But inasmuch as the distinction is so plain and the ability to prove an act to be gambling so easy, it is almost ridiculous to say that in order to provide for the public safety it is necessary to prohibit all option contracts, strictly speaking. Would it be contended for an instant that because some men have made contracts for the sale of property to be delivered at a future time without any intention of ever delivering the property and with the intention of settling upon differences, that the legislature would be authorized to prohibit all contracts for the sale of property to be delivered in the future? Such an enactment would practically prohibit the sale of property, for perhaps not one-tenth of the property sold in commercial pursuits is sold for present delivery.

Option contracts are entered into in nearly every line of business. The manufacturer contracts to have an option to purchase coal at a certain price. Steel mills contract to have an option to purchase iron ore as required at a certain price. Woolen mills contract to have an option to sell all they manufacture to a wholesale house at a given price. Men hire themselves out and as a part consideration of their labor take an option to purchase a manufacturing plant. Millers buy grain, and in the event the same shall be proven satisfactory take an option to purchase additional quantities thereof. The government of the United States in the war with Spain, not knowing how long the war may last, enters into option contracts to purchase supplies for the maintenance and comfort of the soldiers in the field. And so there are many conditions in which a conservative

business man deems it important to his interests to take an option to purchase a commodity, and likewise men make option contracts to sell, not knowing for sure what quantity of goods they may be able to furnish. *Disborough* v. *Nelson*, 3 Johns. Cas., 81.

Should a man desire to acquire the control of a corporation, or the larger interest in a copartnership, the law, as it is now construed in Illinois, makes it unlawful for him to contract to have an option with each of the stockholders of the corporation, or with the members of the copartnership, to buy their interest until he is able to ascertain whether or not he can obtain from the different members a majority of their stock or interest.

As a matter of fact, an option contract is a most cumbersome instrument in which to gamble in grain or stocks. If a member of the Board of Trade has contracted to have an option to purchase 10,000 bushels of corn at thirty-one and one-half cents at any time within ten days, and during that time the market rises, if he desires the grain he calls the corn, which would be delivered to him. If the market goes down, instead of calling the grain to be used for the purpose for which he intends to buy it, he goes into the market and purchases grain of the same quality at a less figure. Such is also the case of contracts for the buying and selling of grain upon the Board of Trade for future delivery. One unfamiliar with the conditions might wonder wherein the much-talked-of gambling transactions upon the Board of Trade arise. As a matter of fact, in the contracts entered into between the members of the Board of Trade there is no gambling. Each party must intend to deliver the grain and is required by the rules of the Board to deliver it, unless the members' deals are settled through the clearing-house, when there is a constructive, if not a physical, delivery of the warehouse receipts.

The gambling transactions, if there are any such, are between the brokers and their clients, in which the brokers agree to deal for their clients in options, to use that term in the sense it is sometimes used as meaning contracts for the actual purchase and sale of commodities where the parties do not intend to deliver the commodity, as distinguished from a strictly legal option contract. The reports are full of such cases. Often the clients do not know that they ever had a bushel of wheat. In fact, they never intended that any should be delivered to them; nor have many of them the money to purchase the grain they order their brokers to buy for them. In such transactions, however, the grain is actually delivered to the broker, and although such persons trading through a broker may intend that no grain shall be delivered, yet the broker's transactions upon the Board of Trade, wherein he purchases and sells, are *bona fide* commercial transactions where delivery is not only intended but actually accomplished.

The remedy for such transactions is not to prohibit option contracts, for the "gigantic evil" of which the Illinois Supreme Court has in several of its opinions spoken, did not arise out of contracts to have or give an option, but out of contracts for the purchase or sale of commodities where the parties did not intend to deliver or receive the goods, but to settle in differences, which sometimes in the nomenclature of the business are called "options."

This court in a long line of cases has held that while in the exercise of the police power the States may prescribe rates to be charged by railways and other corporations exercising public or *quasi* public functions, yet this power is subject to the limitation that such rates must be reasonable; that the question whether the rates prescribed are in fact reasonable is a judicial question; that to compel such companies to perform their services for less than reasonable

rates is to deprive them of property without due process of law. *Stone* v. *Farmers Loan & Trust Company,* 116 U. S., 307, 331; *Chicago, etc., Railroad Co.* v. *Minnesota,* 134 U. S., 418; *Chicago, etc., Railway Co.* v. *Wellman,* 143 U. S., 339; *Regan* v. *Farmers Loan & Trust Co.,* 154 U. S., 362; *Covington & Turnpike Co.* v. *Sandford,* 164 U. S., 578; *Smyth* v. *Ames,* 169 U. S., 466; *Lake Shore, etc., Railway Co.* v. *Smith,* 173 U. S., 684.

Such companies are not more within the protection of the Fourteenth Amendment than is the citizen. In fact the corporation and the citizen are equally "persons" within its terms. It is true that congress is given power over the subject of commerce, and that these public service corporations have in many instances successfully resisted the unwarranted or pretended exercise of the police power for the reason that it interfered with interstate commerce. In other cases these attempts have been frustrated on the ground that their application invaded property rights. These rights are equally protected under the Constitution. The right to untrammeled commerce is no more sacred under that instrument than the rights of life, liberty and property. The commerce clause confers no greater power on the federal judiciary to set aside unwarranted State legislation when invoked by a public service corporation, than does the Fourteenth Amendment when invoked by the humblest citizen. The rights secured to the citizen as against national action, through the guarantees of the first ten amendments, were secured by this amendment, along with those contained in the original Constitution, from invasion by the State through any of its agencies. It is not necessary in this case to consider whether in the protection of these rights against the abuse of the police power he is not equally entitled to adduce evidence establishing such exercise to be unreasonable.

Here it has been repeatedly declared by the Supreme Court of Illinois that the kind of contract involved was at common law and in the forum of morals perfectly legal and free from blame. The right to contract is one of the rights of freeman, of every person not under disabilities. The only limitations which may constitutionally be placed thereon must have a reasonable and necessary relation to the public health, safety or morals. It cannot injure any of these that A., not knowing whether the exigencies of his business will require him to deliver one hundred thousand more bushels of corn than he possesses, pays B. one hundred dollars for the privilege of purchasing it from him if he desires; of if he thinks that perhaps his family will be suited with B.'s country estate pays him a like sum for the option to take it within a time named. There is no element of gambling in these transactions and to make them unlawful is to declare that a man may not provide conditionally for the exigencies of his business or the satisfaction of his desires. Commerce cannot be conducted under such a hard and fast rule. All reasonable demands of the State will be satisfied if this court shall hold that in the exercise of its police power on this subject it is limited to contracts where the intention is present to settle in differences and may not forbid contracts confessedly moral and in no way capable of doing injury to the public. Such a construction, it is submitted, is well within the principles announced by this court in *Mugler* v. *Kansas,* 123 U. S., 623, 661, 663, 664; *Minnesota* v. *Barber,* 136 U. S., 313; *Brimmer* v. *Rebman,* 138 U. S., 78; *Lawton* v. *Steele,* 152 U. S., 133, 136; *Holden* v. *Hardy,* 169 U. S., 366, 392; *Collins* v. *New Hampshire,* 171 U. S., 30, 34, and other cases above cited.

It is submitted that the statute, in so far as it is construed by the Supreme Court of the State of Illinois to pro-

hibit the making of *bona fide* legal moral option contracts, is an invasion of the rights of liberty and property guaranteed by the Constitution of the United States; that the plaintiff in error was not guilty of any offense against the peace and dignity of the people of the State of Illinois, and that the judgment of the court below should be reversed.

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